Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

SOCORRO ROQUE ESPINOZA,
Petitioner,

v.

PETER KEIZLER, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Board of Immigration Appeals definition of "a crime of sexual abuse of a minor" a permissible construction of the statute and thus entitled to *Chevron* deference if it renders the word "abuse" superfluous and thus includes crimes which do not have "abuse" as an element?

Is a conviction for a crime of sexual contact with a minor under 18 categorically a "crime of sexual abuse of a minor" regardless of the fact that the statute criminalizes such contact with 17 year olds who have affirmatively consented?

PARTIES TO THE PROCEEDINGS

Petitioner is Socorro Roque. Respondent is the Attorney General of the United States.[1]

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[1] At the time this petition is filed, the post of Attorney General is held by Peter Keisler, subsequent to the resignation of Alberto Gonzales who previously held the post.

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PETITION FOR A WRIT OF CERTIORARI

Socorro Roque-Espinosa (Roque), a longtime lawful permanent resident of the United States, respectfully petitions for a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinions of the court of appeals *(App., infra, A1-A2)* are unreported. The decisions of the Board of Immigration Appeals *(App., Infra, A3-A6* and the immigration judge *(App., infra, A7-A9)* are also unreported.

JURISDICTION

The memorandum of opinion and judgment of the Court of Appeals was entered on April 23, 2007. The decision of the Court of Appeals denying rehearing was entered on Jul1 11, 2007. *(App. A10-A11).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1252(a)(2)(D).

STATUTORY PROVISIONS INVOLVED

Pursuant to the Immigration and Nationality Act ("INA") §237(a)(2)(A)(iii); 8 U.S.C. §1227(a)(2)(A)(iii): "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."

Pursuant to INA §101(a)(43)(A); 8 U.S.C. §1101(a)(43)(A), the term "aggravated felony" means: "murder, rape, or sexual abuse of a minor."

However, the term "sexual abuse of a minor" is not further defined in the INA or otherwise defined by reference to state law or to any other part of the United States Code.

The statute under which Roque was convicted, Oregon Revised Statute 163.415 states:

> (1) A person commits the crime of sexual abuse in the third degree if the person subjects another person to sexual contact and: (a) The victim does not consent to the sexual contact; or (b) The victim is incapable of consent by reason of being under 18 years of age.
>
> (2) Sexual abuse in the third degree is a Class A misdemeanor.

18 U.S.C. § 3509(a)(8) from the Federal Rules of Civil Procedure defines sexual abuse in the context of the rights of child victims and witnesses:

> the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

STATEMENT OF THE CASE

Relying on the Board of Immigration Appeals' decision in *In re Rodriguez-Rodriguez,* 22 I. & N. Dec. 991, 995-96 (BIA 1999), the Ninth Circuit Court of Appeals affirmed both the immigration judge's and the Board's earlier determination that Roque's conviction under Or. Rev. Stat. §163.415. was a conviction for a crime of "sexual abuse of a minor" as that term is used at INA §101(a)(43)(A); 8 U.S.C. §1101(a)(43)(A). The Ninth Circuit held that the Board's interpretation was entitled to deference as a permissible reading of the statute.

Based upon the plain language of the statute, the Board's interpretation of the generic category, crimes of "sexual abuse of a minor," is based upon an impermissible construction and thus is not entitled to deference by the circuit courts, as it does not require that actual "abuse" have occurred. The Ninth Circuit itself has otherwise defined "sexual abuse of a minor" to contain a distinct harm element which must be proven. *See, United States v. Lopez-Solis,* 447 F.3d 1201, (9th Cir.2006).

1. Factual Background.

In July of 2000, Socorro Roque, a Lawful Permanent Resident of the United States since 1990, was convicted by plea of sexual abuse in the third degree under Or. Rev. Stat. §163.415. He was sentenced to 365 days imprisonment, all of which was suspended, and 60 months of supervision and other conditions. Five years later, after the expiration of his probationary period, he was

arrested and detained by Immigration and Customs Enforcement ("ICE") and charged with being removable for having committed an aggravated felony, to wit: "sexual abuse of a minor."

2. The Decision of the Immigration Judge.

In support of this charge the government submitted an information and a judgment, but not the plea agreement.[1] On July 29, 2005, based upon the limited record of conviction documents submitted by the government, the immigration judge ordered Roque removed. Without performing any analysis, the immigration judge held that Roque's conviction under Or. Rev. Stat. §163.415 statute was an aggravated felony because it was a crime of sexual abuse of a minor. (App. A9).

3. The Decision of the Board of Immigration Appeals.

Upon appeal, the Board of Immigration Appeals upheld the decision of the immigration judge. The Board noted that the statute was divisible as it punished acts against minors and other victims. The Board then undertook a modified categorical analysis based on the conviction documents submitted to the Court.

---

[1] The Government also submitted the conditions of supervised release and a few other conviction related documents which are not otherwise relevant at this time.

Based on the Board's earlier holding in *Rodriguez-Rodriguez* and other Ninth Circuit holdings, the Board held that Roque's crime did involve "sexual abuse of a minor." The Board reasoned that the statute should be read broadly, which was consistent with the Board's published decision in *Rodriguez-Rodriguez*, and the fact that the minor may have granted actual consent or been almost 18 was irrelevant to the determination whether the crime was one of sexual abuse because the consent, even if given by an older teen, was not legal.

> Moreover, including only crimes that require lack of consent for reasons other than age within the category of crimes that qualify as "sexual abuse of a minor" would exclude many offenses, like statutory rape, that routinely have been classified as sexual abuse of a minor. *(App A5)*.

In reaching this conclusion, the Board never addressed whether sexual contact with a person under 18 years of age was per se abusive. Instead, the Board focused on the age of the victim.

4. The Memorandum Decision of the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals affirmed both the Board's and the immigration judge's earlier rulings. The panel denied held:

> the BIA correctly determined that [Roque's] conviction qualifies as "sexual abuse of a minor" pursuant to *In re Rodriguez-Rodriguez,* 22 I. & N. Dec. 991, 995-96 (BIA 1999). We held in *Afridi v. Gonzales, 442 F.3d 1212, 1216 (9th Cir.*2006), that the BIA's construction of the statute in *Rodriguez-Rodriguez* is permissible, so we must defer to the BIA's interpretation.
>
> *Roque-Espinosa v. Gonzales,* 229 Fed.Appx. 495, 496 (9th Cir. 2007). *(App A1-A2).*

In a one page order, the Ninth Circuit denied Mr. Roque's Petition for Re-Hearing. *(App. A10).*

REASONS FOR GRANTING THE WRIT

A. The BIA's Interpretation Of The Term "Sexual Abuse Of A Minor" As Defined In *In re Rodriguez-Rodriguez* Is Impermissible.

In upholding the Board's definition of sexual abuse of a minor, the Circuit Court has upheld an impermissible construction of the statute which is not entitled deference to the extent that the definition includes sexual conduct which is not abusive. While states are allowed to make otherwise innocuous sexual conduct involving minors illegal by defining the age of consent as a general prophylactic

against the potential for abuse, the legislature's act of rendering sexual conduct illegal does not make it inherently abusive.

Under the plain language of the statute, the elements of a crime of sexual abuse of a minor are: (a) that the crime involved sexual activity; (b) the activity was abusive; and, (c) to a minor victim. Any construction of the statutory language which includes mere sexual conduct, does not require that the sexual activity constitute *abuse* is an impermissible construction of the statute in that it renders the word "abuse" superfluous and thus violates a fundamental canon of statutory construction.

1. The Definition Employed By the BIA to Which the Ninth Circuit Has Deferred.

In *Rodriguez-Rodriguez, supra* the Board of Immigration Appeals postulated an extremely broad definitional guide rather than a rigid definition of what constitutes sexual abuse of a minor. In doing so, the Board indicated that it is free to choose among any of a number of federal statutory definitions of sexual abuse in analyzing a state statute. It first looked at several federal criminal statutes. These, however, were insufficiently broad for the Board as the federal criminal statutes did not include crimes with no physical contact as sexual abuse crimes. The Board held that sexual abuse should be defined broadly and found a federal definition it liked buried in the federal rules of criminal procedure:

> We find the definition of sexual abuse in 18 U.S.C. § 3509(a)(8) to be a *useful identification* of the forms of sexual abuse. This statute *encompasses* those crimes that can reasonably be considered sexual abuse of a minor. The term "sexual abuse" is commonly defined as "(i)llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance." Blacks Law Dictionary 1375 (6th ed. 1990). Abuse is defined in relevant part as physical or mental maltreatment. This definition suggests that the common usage of the term includes a broad range of maltreatment of a sexual nature, and it does not indicate that contact is a limiting factor. *Matter of Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 995 - 996 (BIA 1999).

Thus, the Federal statute chosen by the Board as its "definitional guide" defines sexual abuse in the mostly unrelated context of the rights of child victims and witnesses. Noticeably, this disregards the presumably more relevant federal statutes which concretely define the actual crimes of child abuse in the context of a criminal offense. For that case, the Board defined "sexual abuse of a minor" as:

> "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation,

> prostitution, or other form of sexual exploitation of children, or incest with children." *Rodriguez-Rodriguez,* 22 I. & N. Dec. 991, 995 (BIA 1999), (quoting 18 U.S.C. § 3509(a)(8)).

While this language world appear on its face to be a fair definition of what is commonly thought of as sexual abuse, when applied to simple age of consent statutes it is quite overbroad. In the context of consensual sexual activity involving older teens it is impermissible. For this definition does not *define sexual abuse* of a *minor.* Rather, it defines *sexual abuse of children.* In both legal parlance and the common vernacular, *child* and *minor* are not necessarily the same thing.

While it is readily accepted that all sexual activity with *children* is inherently abusive, it is utterly unsupportable to claim that all sexual activity involving a minor who is an older teen is inherently abusive. In that situation, context is everything.

2. Chevron Deference.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the Court established the two pronged test for determining the extent of deference to an agency decision:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

3. Canons of Statutory Interpretation.

In interpreting the language of a statute, courts must assume that Congress used the words of the statute as they are commonly and ordinarily understood and must construe the statute so each of its provisions is given full effect. *United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir.) (interpreting penalty provision of § 924(c) for "second or subsequent conviction"), cert. denied, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987). Further, the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results. *United States v. Smith*, 957 F.2d 835, 836 (11th Cir.

1992) (interpreting the phrase "during and in relation to any ... drug trafficking crime" as set forth in § 924(c) to include trading guns for drugs), aff'd, 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993).

"[W]e must interpret the undefined term 'sexual abuse of a minor' by 'employing the ordinary, contemporary, and common meaning of the words that Congress used.' ") *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999). In so doing, we "look solely to the statutory definition of the crime, not to the name given to the offense or to the underlying circumstances of the predicate conviction." *Baron-Medina*, 187 F.3d 144, 1146 (9th Cir. 1999), *Rivas-Gomez v. Gonzales*, 441 F.3d 1072, 1074 (9th Cir.2006).

B. Sexual Abuse of a Minor Contains Three Distinct Elements.

The clear language of the INA defines the relevant aggravated felony according to three independent elements. These are "sexual conduct", which constitutes "abuse," and "of a minor." As elements of a generic crime, the distinct elements of the generic category are analyzed separately in order to ascertain whether a criminal statute is a categorical match with the INA and thus is an aggravated felony.

1. The Minor Element.

Perhaps the simplest part of this definitional puzzle is who qualifies as a "minor." The BIA, in the context of sexual abuse of a minor has defined the

term minor thus: "The term minor is...commonly defined as "a person who is under the age of legal competence, which in most States is 18.." *Matter of V-F-D,* 23 I. & N. Dec. 859, 862 (BIA 2006). It acknowledged that minor is intrinsically a legal term, as it is has no significant meaning outside of a legal context.

However, in defining what is a minor, the Board also illustrated, albeit unknowingly that minor is a distinct element of the crime: "Consequently, we conclude that a **victim of sexual abuse** is a "minor" for purposes of section 101(a)(43)(A) of the Act if he or she is under 18 years of age. *Id. (Emphasis added).*

Minor does not define sexual abuse any more than sexual abuse defines minor. A victim of sexual abuse may in fact be a minor. However, a minor who engages in illegal sexual activity may not in fact be a victim of sexual abuse. Thus, "minor" in the language of this statute, defines a group of victims. "Sexual abuse," in contrast, defines the nature of the crime. The importance of this we think, should be quite apparent

2. Sexual Conduct.

Among the Circuit Courts, the requirement that sexual abuse requires sexual conduct is well established. For example, in *U.S. v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001), the court held that "'sexual abuse of a minor' means a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification."

3. The Abuse Element.

Of the three elements of the statute, determining whether sexual conduct involving a minor constitutes sexual abuse is likely the most difficult and involving. Nevertheless, determining whether a criminal statute punishes "sexual abuse" as a element of the crime cannot simply be presumed from its match with the other two elements. Doing so renders requirement of an abuse element irrelevant and superfluous. Instead, the element of abuse must be defined separately based upon the nature of the conduct and the parties to sexual conduct.

In *U.S. v. Lopez-Solis*, 447 F.3d 1201, 1208 (9th Cir. 2006), the Ninth Circuit undertook a thorough analysis to determine whether a statute has an element of sexual abuse. "Employing the dictionary definition, we have defined abuse as "misuse ... to use or treat so as to injure, hurt, or damage ... to commit indecent assault on". *Id.* It noted that the Eleventh Circuit had similarly defined abuse in this context to mean "physical or nonphysical misuse or maltreatment. The Court also pointed out that both definitions encompass behavior that is harmful emotionally and physically.

It then analyzed the criminal statute to determine whether the conduct prohibited was categorically harmful both physically and mentally. In found that the statute was overbroad in that some of the actions criminalized . Specifically it noted that in the case at hand,

> The "slight," consensual sexual penetration of a minor just under 18 by

> a 22 year old also is not necessarily psychologically harmful or damaging for two reasons. First, the government has not furnished us with evidence showing such harm. In the absence of evidence, we refuse to assume the existence of harm. Second, our prior caselaw-as well as common sense-suggest that, while consensual underage sex may be psychologically harmful to a young teen, it may not be harmful to an older one.
>
> *Lopez-Solis,* at 1208.

The abuse element protects against cruelty to a child's "well being" which, on its face, mandates that actual harm occur to the child victim and that there be the perniciousness of a subjective evil intent. "[A]buse" is "injur[ing], hurt[ing], or damag[ing] the individual." *U.S. v. Pallares-Galan,* 359 F.3d 1088, 1101 (9th Cir. 2004); Sexual '[a]buse' requires more than improper motivation; it requires *conduct* that is *abusive.*" *Parrilla v. Gonzales,* 414 F.3d 1038, 1041 -1042 (9th Cir. 2005); "[The act [was] 'abusive' because of the psychological harm inflicted irrespective of the presence of physical injury. *U.S. v. Izaguirre-Flores,* 405 F.3d 270, 275 (5th Cir. 2005).

Moreover, an "abuse" or "harm" element is necessary because acts of "*sexual conduct* with a minor," is an inherently broader category than acts of "*sexually abusive conduct* with a minor." This is simply illustrated by noting that "sex" is not categorically a direct analogue of "sexual abuse."

Thus, to the extent that an interpretation of the statute holds unequivocally that *all sexual conduct in which a minor is involved* (as opposed to a child) is per se sexual abuse of said minor simply because it is illegal, the interpretation is impermissible. Instead, a categorical analysis must be performed on the statute to determine if it has an abuse element, as well as determining whether the conduct is "sexual" and whether a "minor" was the victim.

4. Any Other Reading of the Statue Would Make the Word "Abuse" Superfluous.

The courts *will not* read statutes to render language in the statutes superfluous. *Pennsylvania Department of Public Welfare v. Davenport*, 495 US 552, 562 (1990). Thus, any agency definition which ignores the fact that Congress chose to use the phrase "sexual abuse" of a minor, instead of the broader phrase "sexual conduct", or even "sexual contact", or "sexual intercourse," and interprets the statute as if Congress did use one of the other obvious phrases, is an impermissible construction.

"When one interpretation of a statute or regulation obviously could have been conveyed more clearly with different phrasing, the fact that the authors eschewed that phrasing suggests, ceteris paribus, that they in fact intended a different interpretation." *U.S. v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000). (*Internal cites omitted*).

C. The Same Phrase Cannot Have Two Definitions In The Same Circuit In The Absence Of A Meaningful Reason.

Were the Ninth Circuit to apply the harm based definition in *Lopez-Solis* to this case, the outcome necessarily would have been different. Instead, it deferred to the BIA's definition in *Rodriguez-Rodriguez* which simply presumes that all sexually explicit conduct with a minor is abusive. *See: Afridi v. Gonzales*, 442 F.3d 1212 (9th cir. 2006).

In *Lopez-Solis*, deference was not an issue because the same phrase "sexual abuse of a minor" was being analyzed in a criminal sentencing context. It noted this discrepancy at the end of the decision

> Our recent decision in *Afridi v. Gonzales* is not to the contrary. There, we affirmed the Board of Immigration Appeals' determination that the phrase "sexual abuse of a minor" under the Immigration and Nationality Act ("INA") encompassed a conviction for the statutory rape of a victim under 18. In that case, "established principles of deference to administrative agencies" [narrowed our review to whether the Board's determination was "contrary to the plain and sensible meaning of the [INA]." Because we found the Board's "construction [of the phrase 'sexual abuse of a minor'] permissible," we had to defer to it. In this case, no agency is involved. Thus, we owe no deference to agency interpretation. We are faced

> with an entirely different task: reviewing *de novo* the district court's definition of the phrase "sexual abuse of a minor." Accordingly, we need not adopt the definition adopted by the Board to which the panel deferred in *Afridi*.
>
> *U.S. v. Lopez-Solis* at 1209 -1210. *(Footnotes omitted).*

Rather, remarkably, the Ninth Circuit has two separate definitions of "sexual abuse of a minor." Which definition is to be used depends entirely upon whether the same conviction is to be analyzed to determine whether it is a crime of sexual abuse of a minor to determine whether an alien is to be deported, or is to have his sentence enhanced for illegally returning after he was deported.

The absurdity is revealed in this: Roque may well be deported for having been convicted for a crime of sexual abuse of a minor and thus an aggravated felony as defined at 8 U.S.C. § 1101(a)(43)(A). If he were then to return and be convicted for illegal re-entry, he would not be subject to a sentence enhancement because he was not convicted of an aggravated felony sexual abuse of a minor. It is self evident that the existence of two different interpretations of the same phrase, quite obviously reveals that one of them is wrong.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Filed APR 23, 2007
Cathy Catterson
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOCORRO ROQUE-ESPINOSA, No.05-76974

Petitioner, INS No. A91-008-337

v.

MEMORANDUM

ALBERTO R. GONZALES, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted April 13, 2007
Seattle, Washington

Before: **KOZINSKI** and **FISHER,** Circuit Judges, and **GUILFORD,** District Judge.

Petitioner does not dispute that he was convicted under subsection (1)(b) of Or. Rev. Sta. § 163.415, and the BIA correctly determined that such

a conviction qualifies as "sexual abuse of a minor" pursuant to In re Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 995-96 (BIA 1999). We held in Afridi v. Gonzales, 442 F.3d 1212, 1216 (9th Cir. 2006), that the BIA's construction of the statute in Rodriguez-Rodriguez is permissible, so we must defer to the BIA's interpretation. Because the BIA properly determined that petitioner was removable for having committed an aggravated felony, we lack jurisdiction to review his petition. See 8 U.S.C. § 1252(a)(2)(C).

DISMISSED.

This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The Honorable Andrew Guildford, United States District Judge for the Central District of California, sitting by designation.

U.S Department of Justice
Executive Office for Immigration view

Falls Church, Virginia 22041

File: A91 008 337 - Seattle Date: **Nov 18, 2005**
In re: SOCORRO ROQUE-ESPINOSA
IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT: Matthew Weber, Esquire

ON BEHALF OF DHS: Robert F. Peck
Assistant Chief Counsel

CHANGE:
Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]-
Convicted of aggravated felony
APPLICATION: Termination

On July 29, 2005, an Immigration Judge found the respondent removable as charged and ineligible for relief from removal. The respondent has appealed from this decision. The appeal will be dismissed. The respondent's fee waiver request is granted. See 8 C.F.R. § 1003.8(c).

The respondent is a native and citizen of Mexico. He entered the United States without inspection in March 1985 and adjusted his status to that of a lawful permanent resident on December 1, 1990. On July 25, 2000, he was convicted of sexual abuse in the third degree under Or.Rev.Stat. §

163.415. He was sentenced to 365 days in prison for this crime.

The key issue on appeal is whether the Immigration Judge correctly determined that the respondent's offense constitutes "sexual abuse of a minor" for the purpose of section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A). The respondent contends that the statute under which he was convicted is extremely broad and includes acts, such as consensual sexual acts between 17-year-olds, which should not be classified as sexual abuse of a minor. The respondent claims that these acts might not be punished in a state with a different age of consent and therefore should not be removable offenses here. We disagree with the respondent's claims.

The respondent was convicted under Or.Rev.Stat. § 163.415. This statute states:"[a] person commits the crime of sexual abuse in the third degree if the person subjects another person to sexual contact and (a) the victim does not consent to the sexual contact; or (b) the victim is incapable of consent by reason of being under 18 years of age." Because this statute punishes both acts against minors and acts against other victims, it is divisible. We therefore may look beyond the statutory language to "a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings." See *Tokalty v. Ashcroft*, 371 F.3d 613, 620(9th Cir. 2004). The indictment and the judgment of conviction show that the respondent, who was 33

years old at the time, pled guilty to "unlawful and knowingly subject[ing the victim], a person under the age of 18 years, to sexual contact by touching her vagina." This offense qualifies as "sexual abuse of a minor" both under our precedent and the precedent of the United States Court of Appeals for the Ninth Circuit, the circuit in which this case arises. See *Valencia v. Gonzales*, 406 F.3d 1154, 1156 n.2 (9th Cir. 2005)(finding that felony sexual intercourse with a person under 18 who was more than 3 years younger than the perpetrator is sexual abuse of a minor); *United States v. Alvarez-Gutierrez*, 394 F.3d 1241 (9th Cir. 2005)(finding that statutory sexual seduction under Nevada law is sexual abuse of a minor), *United States v. Granbois*, 376 F.3d 993 (9th Cir. 2004); *Matter of Rodriguez-Rodriguez*, 22I&N Dec. 991 (BIA 1999)(discussing meaning of "sexual abuse of a minor").

The fact that the victim may have consented or may have been almost 18 does not change our conclusion. Minors are not legally capable of consent for a variety of reasons including a desire to protect them from the undue influence of older individuals who may appear as authority figures. Thus, a victim of the crime of sexual abuse in the third degree under Oregon law did not legally consent to the sexual contact regardless of what may have transpired during the commission of the offense. Moreover, including only crimes that requires lack of consent for reasons other than age within the category of crimes that qualify as "sexual abuse of a minor" would exclude many offenses, like statutory rape, that routinely have been classified as "sexual abuse of a minor." See *Valencia v. Gonzales*, supra; Lynne

Henderson, Without Narrative: Child Sexual Abuse, 4 VA.J.SOC.POL'Y & L.479, 481(1997)(stating that "[b]y sexual abuse, I mean everything ranging from rape to statutory rape to oral and anal contact to genital touching..."'); Alaska Stat. §§ 11.41.434, 11.41.438, 11.41.440; Me.Rev.Stat. tit. 17 –A, § 254. We do not find that this narrowing of the definition is consistent with Congressional intent. See *Matter of Rodriguez-Rodriguez, supra*, at 994.

In addition, we do not find that including individuals under age of 18 in the category of "minors" conflicts with the intent of section 101(a)(43)(A) of the act. In *Matter of Rodriguez-Rodriguez, supra*, we recognized that states categorize and define sex crimes against children in many different ways. We then considered Congressional intent, various state and federal statutes and the common understanding of the term "sexual abuse of a minor" before arriving at a general guideline for the term's meaning. *Id.* This analysis is equally applicable here. Black's Law Dictionary defines the term "minor" as "[a] person who has not reached full legal age." See Black's Law dictionary (8th Ed. 2004). And many states define 18 as the full legal age or the age of majority. See, e.g, Cal. Fam. Code § 6500; N.Y. EPTL § 2-1.10; Or. Rev. Stat § 109.510; Tex. Civ. Proc. & Rem. Code § 129.01. Moreover, 18 U.S.C. §3509(a)(2), the statute we found most instructive in *Matter of Rodriguez-Rodriguez*, defines the term "child" as a person "who is under the age of 18." Given these facts, we find that defining minor to include individuals under the age of 18 best captures the common usage and understanding of the word "minor," and the intent of Congress to expand

the definition of aggravated felony to protect children. See *Matter of Rodriguez-Rodriguez, supra*: *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999). We therefore cannot conclude that the portion of the Oregon statute under which the respondent was convicted is overly broad or includes offenses that do not constitute sexual abuse of a minor as the respondent claims.

Based on the foregoing, we find that the Immigration Judge acted properly in concluding that the respondent's offense qualified as "sexual abuse of a minor" and in findings that the respondent is removable as changed. Accordingly, we uphold the Immigration Judge's decision, and we dismiss the respondent's appeal.

ORDER: The appeal is dismissed.

/s/ _____

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGARTION REVIEW
UNITED STATES IMMIGRATION COURT
File No.: A 91 008 337
July 29, 2005 Seattle, Washington

In the Matter of

SOCORRO ROQUE ESPINOSA IN REMOVAL PROCEEDNGS

Respondent
CHARGE: Section 237 (a) (2) (A) (iii) of the Immigration and Nationality Act, as amended.
APPLICATIONS: None.
ON BEHALF OF RESPONDENT
MATTHEW B. WEBER
ATTORNEY AT LAW
ON BEHAL F OF DHS
Robert Peck
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 38-year-old native and citizen of Mexico who was placed in removal proceedings by the Department of Homeland Security with the filing of his Notice to appear. The Notice to Appeal is contained in the record as Exhibit 1. A copy was personally served on the respondent on July 15, 2005. This matter came regularly on for hearing on the Court's Master Calendar this date, July 29, 2005. At that time, pleadings were taken.

The respondent conceded service of his Notice to Appear after a copy was provided by the Court to

respondent's counsel. The respondent thereafter admitted factual allegations 1 through 4, and initially denied factual allegation 5. Factual allegation 5 alleges that the respondent was, on July 25, 2000, convicted in the Circuit for the State or Oregon in and for Marion County for the offense of sexual abuse in the third degree in violation of ORS 163.415 in Case No. 00C40314.

The department of Homeland Security thereafter provided the record of conviction, which is contained in the record as Exhibit 2. The record of conviction was admitted into evidence without objection. On the basics of the record of conviction, the respondent's counsel thereafter admitted factual allegations 5, and the Court sustained the charge of removability under 237 (a) (2) (A) (iii). The court designated Mexico as the country for removal. The respondent then conceded that because the Court has found that he is removable as an aggravated felon, he is not eligible for any form of relief.

The Court, in fact, finds that the respondent is removable under 237 (a) (2) (A) (iii) because the respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(A) of the Act relating to sexual abuse in the third degree. On the basis of the respondent's admissions of record and the Court's finding, the Court finds the respondent is not eligible for any other form of relief.

ORDER

IT IS HEREBY ORDERED that the respondent be removed to Mexico on the change contained in his Notice to Appear.

/s/

Edward R. Kandler Immigration Judge

Filed
July 11, 2007
Cathy Catterson
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOCORRO ROQUE-ESPINOSA, No.05-76974

Petitioner, INS No. A91-008-337

v.

ORDER

ALBERTO R. GONZALES, Attorney General,

Respondent.

Before: **KOZINSKI** and **FISHER,** Circuit Judges, and **GUILFORD,** District Judge.

The petition for rehearing en banc is **DENIED.** See Fed. R. App. P.35.

The Honorable Andrew Guildford, United States District Judge for the Central District of California, sitting by designation